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No. 541

In the

Supreme Court of the United States

OCTOBER TERM, 1962

LOCAL 100 OF THE UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES,

Petitioner,

v.

H. N. BORDEN,

Respondent.

On Writ of Certiorari to the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas

BRIEF FOR PETITIONER

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BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas, rendered February 9, 1962, affirming damage judgment against petitioner (R. 348) is reported at 355 S. W. 2d 729.

Earlier opinions and orders of the Texas courts in this case are also contained in the record, viz:

Unreported order of the District Court of Dallas County, Texas, rendered February 15, 1957, sustaining jurisdictional pre-emption plea and dismissing the suit, R. 16.

Unreported opinion of the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas, rendered April 11, 1958, affirming dismissal, R. 17.

Opinion of the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas, rendered July 25, 1958, reported at 316 S. W. 2d 458, withdrawing its opinion of April 11, 1958, and remanding for trial on the merits, R. 22.

Opinion of the Supreme Court of Texas, 160 Tex. 203; 328 S. W. 2d 739, rendered November 4, 1959, affirming remand for trial on the merits, R. 26.

Judgment of the District Court of Dallas County, Texas, entered October 3, 1960, awarding respondent Borden damages against petitioner, Local 100, R. 60-72.

JURISDICTION

The judgment of the Court of Civil Appeals for the Fifth Judicial District of Texas was entered on February 9, 1962, R. 348.

The Supreme Court of Texas refused timely application for Writ of Error on July 25, 1962 (R. 361) making final the decision of the Court of Civil Appeals.

A petition for writ of certiorari was granted on December 17, 1962 (R. 362). The jurisdiction of this Court is invoked under 62 Stat. 922(3), 28 U.S.C., §1257(3).

QUESTION PRESENTED

Does a state court have jurisdiction to award compensatory and punitive damages against a labor union for its refusal to issue a job referral to a member, which refusal resulted in denial of employment by an employer whose operations affect interstate commerce? Is such conduct by a labor union "potentially subject to the exclusive federal regulatory scheme" expressed in the Labor Management Relations Act of 1947, and thus limited to the exclusive jurisdiction of federal tribunals under the federal Act?

STATUTES INVOLVED

The relevant provisions of the Labor Management Relations Act of 1947 (61 Stat. 136, 29 U.S.C., 141 et seq.), are set forth in Appendix, *infra*, pp. 43-54.

The provisions of *Article 5207-A, Tex. Rev. Civ. Stat., Article 5154 and 5154g, Tex. Rev. Civ. Stat.* are set forth in Appendix, *infra*, pp. 55-58.

STATEMENT

The Texas Courts have denied pleas of federal pre-emption and have awarded compensatory and punitive damages to H. N. Borden against his local union for its refusal to "refer" him to work on a construction project which affected interstate commerce.

A. The State Court Pleadings

Borden's pleadings in the state court (R. 10-15) alleged his membership in defendant union, and its parent Inter-

national,[1] complained of the union's denial of Borden's rights of membership, i.e. the refusal to accept his "clearance card" from a sister local,[2] and the refusal of the business agent to issue him a referral to work for the Farwell Construction Company on the construction of the Republic National Bank Building,[3] which employment Farwell's foreman had offered him, subject to obtaining union referral.[4] Borden alleged that these acts of the union business agent Lanham were ratified by Local 100, that the deprivation of employment on the Republic Bank construction caused loss of earnings in a specified amount, and sought actual and punitive damages, as well as compensation for "mental anguish" (R. 10-15).

The union challenged the state court's jurisdiction, asserting that the subject matter of the suit was within the exclusive jurisdiction of the NLRB pursuant to the Labor Management Relations Act of 1947, *61 Stat. 136; 29 U.S.C. §141 et seq.* (R. 6).

B. The Rulings in the Texas Courts

The trial court initially sustained the plea to the jurisdiction and dismissed the suit, holding "that jurisdiction of a

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[1] The suit was against both Local 100, and its parent International, the United Association. The latter went out of the case by directed verdict, R. 60.

[2] Amended Petition, ¶VII, R. 12. Refusal to accept "clearance" would have meant denial of membership in Local 100 (and a diminution of membership rights in the International). Under Borden's reading of *Gonzales* this is sufficient to base state court jurisdiction. There are two difficulties with Borden's position here: (1) the jury found that there was no denial of clearance; (2) moreover, even if there had been, any refusal of referral based thereon it remains at the core of the Federal regulatory scheme, and is not subject to state jurisdiction, see pp. 14-25, *infra*.

[3] Id., ¶VIII, IX, R. 12.

[4] Id., ¶VI. The Plaintiff's trial amendment (R. 57-59) is even more specific in complaint that the union "refused to * * * refer him (Borden) out to work * * *" R. 58.

suit by an employee to recover for union interference with employment, or discrimination in employment opportunity, is within the exclusive jurisdiction of the National Labor Relations Board under the Federal Labor Management Relations Act, and accordingly this [state] court is without jurisdiction" (R. 16).

The Texas Court of Civil Appeals affirmed the dismissal in an unreported opinion (R. 17-22), holding "* * * the matters involved in this action are, in our opinion within the coverage of the Labor Management Relations Act" (R. 21).

Before the appellate court's opinion became final, and while the case was pending there on Borden's application for rehearing, the Supreme Court of the United States decided *International Ass'n. of Machinists v. Gonzales, 356 U. S. 617.*

The Texas Court of Civil Appeals thereupon withdrew its earlier opinion, substituted an opinion reported at *316 S. W. 2d 458*, citing *Gonzales*, and holding "that the state court has jurisdiction of appellant's suit." *316 S. W. 2d 458 at 461* (R. 22 at 26), and remanded for trial on the merits.

The Supreme Court of Texas granted writ of error on another point, and in an opinion (which does not treat of the jurisdictional issue) affirmed the Court of Civil Appeals and remanded the case for jury trial. *160 Tex. 203; 328 S. W. 2d 739* (R. 26-48), holding:

"[Borden's] allegations will support proof that respondent was wilfully denied a job opportunity to

[3] On remand the jurisdictional federal pre-emption point was again presented by plea to the jurisdiction in the amended answer of the union (R. 55), and by motion for new trial (R. 73), and overruled in both instances (R. 56, 70).

> which Lanham knew he was entitled under the rules and procedures established by petitioners for allocating work among its members, and that petitioners either conspired with Lanham to bring this about or otherwise authorized or ratified his wrongful conduct. If these are the facts * * * respondent is entitled to maintain this suit against petitioners." (R. 34).

On trial to a jury a special issue verdict was returned (R. 62-68) which found, insofar as here pertinent, that Borden was promised a job (conditioned on union referral) on the construction of the Republic Bank Building;[6] that employer requested the union to refer Borden to this job;[7] that union refused to refer Borden to this job,[8] though under the rules of the union the business agent knew plaintiff was entitled to referral,[9] that the refusal of referral was ratified by the local union,[10] that plaintiff suffered actual damage in the amount of $1,916.00 for what he "would have earned, had he been allowed to work on the Republic National Bank Building" less his interim earnings elsewhere.[11] There were also findings of $1,500.00 for mental anguish, and punitive damage of $5,000.00.[12]

Note that the jury found against Borden on his claim of denial of membership rights; i.e. by Special Issue No. 3 the jury found that the local union did not refuse to accept Borden's "clearance card" (R. 63).

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[6]Special Issue No. 1 (R. 62). It is undisputed that the job offer was conditioned on Borden's obtaining a union referral (R. 351; 144).

[7]Special Issue No. 2, R. 62-63.

[8]Special Issue No. 5, R. 63.

[9]Special Issue No. 6, R. 64.

[10]Special Issue No. 8, R. 64.

[11]Special Issues No. 9-10, R. 64-65.

[12]Special Issues No. 11, 12, 13, 14; R. 65-66.

The trial court's judgment (R. 60ff) excised the award for mental anguish (R. 71), reduced the punitive damages to an amount equal to the actual damage, and awarded actual and punitive damages in the sum of $3,832.00 (R. 71).

The Court of Civil Appeals affirmed, *355 S. W. 2d 729* (R. 348-360), again relying on *Gonzales*, it held (R. 350, 351):

> "Appellant again asserts exclusive application of 29 U.S.C.A. § 151, et seq., (Taft-Hartley Act to this lawsuit).
>
> * * * * *
>
> "The suit of Borden as already stated was based on both contract and tort. Even if Borden be considered an employee, which appellee denies, Farwell Construction Company, the contractor and employer, was not a party to the suit and there is no evidence that it practiced any discrimination against Borden or treated him anywise different from other employees. He was simply offered a job and requested to obtain a referral from Local Union 100 as were all other employees of Farwell. By plain wording of the Act, the discrimination must be limited to purpose of encouragement or discouragement of membership in the union and plaintiff was already a member. This is a suit for wrongs allegedly committed against plaintiff by arbitrary conduct of Local Union 100; and as held in International Association of Machinists v. Gonzales * * * the Labor Management and Relations Act does not displace state court jurisdiction over suits to determine and enforce rights of union members in their union."

Union's application for writ of error to the Supreme Court of Texas, asserting the pre-emption point was denied without opinion (R. 361). The United States Supreme Court granted certiorari on December 17, 1962 (R. 362).

C. The Referral System as Applied to Borden

Borden, a member of the Shreveport, Louisiana, local of the plumbers union, came to Dallas in September of 1953 seeking employment by Farwell Construction Co. in the construction of the Republic National Bank (R. 57-58). Borden transferred his membership to Local 100 of Dallas by depositing his "clearance card" with the local (R. 98-99).

Sharply conflicting testimony on many points has been resolved by the Texas courts to establish that Borden was not denied rights of union membership by refusal to "clear him in" to the Dallas local union.

Similarly conflicting testimony has been resolved by the Texas courts to establish that Borden was refused a job referral necessary for him to obtain employment at the Republic Bank construction which had been promised him on the condition that he obtain the referral. The Texas court specifically found that Borden was offered a job on the Republic Bank project by the Farwell foreman and "requested to obtain a referral from Local Union 100 as were all other employees of Farwell" (R. 351). Borden's request for referral was refused by the union business agent (R. 83, 85, 352). The Farwell foreman's follow-up request was also refused (R. 145, 353).

While the collective bargaining agreement between the local union and the Dallas employers (including Farwell) did not contain specific provision requiring union referral (Pl. Ex. 8; R. 187, 273, 344), it was the union custom "that once a request is made by an employer for a specific employee,

that person is immediately referred to the job site" (R. 354). Moreover, all the hiring by Farwell at the Republic Bank job was through union referral (R. 345; 142ff., 152, 214).

The Court below found that refusal of union referral resulted in Borden's failure to obtain the desired employment on the Republic Bank job.[13]

The union By-laws in effect at the time (Pl. Ex. 6; R. 273, 327) provided "Members shall not solicit work from any contractor or their (sic) representative. All employment must be procured through Business Office of Local Union No. 100 * * *."

While no specific jury finding was made as to the cause of the refusal of Borden's referral, Borden testified that union business agent Lanham told him (R. 84):

> "You are not going to work down there on the bank job or for Farwell, you have come in here wrong, you have come in here with a job in your pocket."[14]

The record admits four possible reasons for the refusal of referral; (1) that Borden had violated the cited union rule prohibiting individual solicitation of employment; (2) that the local union followed a policy of discrimination in favor

[13]Defendant's Point 3 on appeal to the Court of Civil Appeals was: "the denial by Lanham of a referral was not the cause for Borden's failure to obtain employment at the bank site." (R. 351.) The Court disposed of this point: "With respect to point three, the referral of plaintiff to the bank site for work at request of Thurman was in accordance with above union custom, refused by Lanham, with resulting injury to plaintiff" (R. 354).

[14]The Court of Civil Appeals noted, similarly, that at a general membership meeting of the union it was stated "that Borden was not referred to the bank site because "he came in here wrong" and would not be allowed to work there (R. 218, 353, 355).

Borden explained that "job in your pocket" could mean that he had been working for Farwell in another city and "was coming in here [Dallas] to still continue to work for the company" (R. 84).

of Dallas members, and against those who "clear in" from other locals;[15] (3) that the refusal of referral resulted from the business agent's caprice, unrelated to union obligation or membership; or (4) that Borden's error—"coming in wrong" related not to an internal union rule, but rather to the hiring hall or referral arrangement prevailing between employer Farwell and Local 100.[16]

Borden concedes that he utilized the union referral system, that the local union did refer him to work on numerous other jobs. Borden's sole complaint was the business agent's refusal to refer him to the Republic job (R. 353; 100, 102, 104).

The union referral system, in the operation of which Borden claims discrimination, is a traditional institution, valuable both to employers and employees, particularly in the building, maritime and other seasonal trades where employment is short lived or sporadic.[17] The referral system offers employers in such industries a reservoir of skilled labor, available on short notice; and offers workers access to jobs

[15]This explanation comports with Borden's attorney's theory of the suit; for he asserted that the local had a policy of refusing referral to out of town members who were in the Local by virtue of clearance cards (R. 194-195).

There is some evidence to support this theory, for the Farwell foreman testified that when he called the local requesting Borden's referral:

> "I asked Mr. Lanham if he had an H. N. Borden there and he said he did, and I said, 'Well, if you give him a referral, send him down to this bank. * * *' He said, 'I am not about to send that old (S.O.B.) down there, he shoved his card down our throat and I am not about to send him to the bank.' " (R. 145, 353.)

[16]Cf. R. 354; 87ff., 142ff., 152, 214, 226, 303.

[17]Senate Report No. 1827, 81st Cong. 2nd Sess., pp. 4-8; Fenton, Union Hiring Halls under the Taft-Hartley Act, 9 Lab. L. Jour. 505 at 507 (1958). (Cf. R. 153).

through a central dispatch.[18] While the social values of the referral systems are well recognized;[19] abuses of the system have given rise to a large body of federal law, whereby the values of the system to both industry and labor are sought to be preserved, while the discriminations sometimes arising in its operation are proscribed.[20]

In the instant case, the state court, on sharply disputed testimony, has found discrimination *vis-a-vis* Borden in the operation of the referral system, and has applied the state's notions as to the proper remedy therefor. This case thus tests the power of state tribunals to regulate hiring systems which affect interstate commerce,[21] and are the subject of federal legislation and a large body of federal law fashioned by the agency to which Congress has committed such regulation.

SUMMARY OF ARGUMENT

(1) The facts found by the state court disclose conduct subject to exclusive federal regulation, either as unfair labor practices proscribed by Sections 8(b)(1)(A) and 8(b)(2) of the Labor Management Relations Act, or privileged under

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[18] See *Teamsters Local 357 v. NLRB, 365 U.S. 667 at 672, 673;* Cf. R. 153.

[19] See views of Senator Taft, S. Rep. No. 1827, 81st Cong., 2d Sess., pp. 13-14.

[20] This very local union has been subjected to NLRB order, 128 NLRB 398, enforced by the Circuit Court, 291 F. 2d 927 (C.A. 5, 1961), on NLRB finding that one Breland "was unable to start working because his employment had been conditioned upon his obtaining a work order or clearance from the union and that he had been unable to secure the necessary order. *Local 100, Plumbers, 128 N.L.R.B. 398, 399 (1960).*

[21] It is stipulated that in the construction of the Republic Bank, at which Borden sought employment, employer Farwell purchased materials having a value of over half a million dollars, which materials were transported in interstate commerce. (R. 273-274.)

that statute. The terms of the federal statute, its legislative history, and its application by federal tribunals all demonstrate that refusal of referral such as here affected Borden is the prototype of the conduct encompassed within the federal orbit. *Radio Officers Union v. NLRB, 347 U. S. 17 (1954).*

Depending upon the reasons to be ascribed to the refusal of referral, the refusal is either proscribed or privileged under the federal Act.

(2) With respect to labor activity subject to Sec. 7 or Sec. 8 of the federal Act the states must defer to the exclusive competence of NLRB to avert the danger of state interference with national policy. "Even the states' salutary effort to redress private wrongs or grant compensation for past harm cannot be exerted to regulate activities potentially subject to the exclusive federal regulatory scheme," *San Diego Bldg. Trades v. Garmon, 359 U. S. 236 (1959).*

(3) While *International Association of Machinists v. Gonzales, 356 U. S. 617 (1958)*, carves a limited exception in the law of federal pre-emption, it does not permit the exercise of state jurisdiction in the instant case, for the cases are distinguishable on the facts. Both the majority and the dissent in *Gonzales* recognize that such complaints as Borden's are for exclusive federal determination. For as the majority noted: "The [Gonzales] suit did not purport to remedy or regulate union conduct on the ground that it was designed to bring about employer discrimination against an employee, the evil the [federal] Board is concerned to strike at as an

unfair labor practice under Sec. 8(b)(2)," *356 U. S. at 622*; and "The state court proceedings [in Gonzales] deal with arbitrariness and misconduct vis-a-vis the individual union member and the union; the Board proceedings, looking principally to the *nexus between union action and employer discrimination* * * *." *356 U. S. at 622, 623* (Emphasis added).

This is the sole nexus upon which Borden's state court recovery is predicated: union refusal to refer, causing employer refusal to hire, thus central to the administration of the federal Act. Clearly, then, the Texas courts have misconstrued and misapplied *Gonzales*.

(4) *Gonzales*, if construed to permit state courts to determine a state's jurisdiction to control referral systems, hiring halls and employment practices should be reexamined for, since *Gonzales*, state courts hostile to the federal regulatory scheme have regulated employee-union controversies in a manner inconsistent with the federal policy.

(5) Finally, there is no compelling state interest to justify state intrusion in hiring practices subject to federal regulation. As the Congress has recognized, control of hiring practices affecting interstate commerce requires a balancing of the public interest against private harm. This, in turn, requires formulation of a uniform policy administered through the expertise of an agency, conversant with the intricate problems of labor economics, to vindicate the public interest in the functioning of traditional employment institutions.

ARGUMENT

1.

The union conduct at issue is within the Federal Statute.

The conduct which the state here regulates is within the complex regulatory scheme of the federal Act. Borden's suit challenges the operation of a union hiring hall and job referral system. His sole basis of recovery is the refusal of a job referral required by Farwell as a prerequisite of employment (R. 354).[22] The Texas state courts thus have determined, by state standards, the propriety of conduct which is continually being tested by the NLRB under Sections 8(b)(1)(A) and (2) of the federal Act.

Congress has determined, *29 U. S. C., §141 et seq.; at §158:*

> "Section 8(b) It shall be an unfair labor practice for a labor organization or its agents — (1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in Section 7; Provided, that this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein * * * (2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) * * *
>
> "Section 8(a) It shall be an unfair labor practice for an employer— * * *
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization * * *"

[22]His "damages" are computed in the state court in the amount he "would have earned, had he been allowed to work on the Republic National Bank Building." See Special Issue #9, R. 64.

The very words of the statute make clear the application to the instant case. Moreover, the legislative history which this court set out in the *Mountain Pacific* case, *Teamsters Local 357 v. NLRB, 365 U. S. 667 (1961)*, emphasizes the intent of the framers of the federal Act to regulate this conduct. Thus, since the Taft-Hartley amendments in 1947 the NLRB, the federal Courts of Appeals[23] and this Court have built a large body of federal case law by which allegations of discrimination in operation of referral systems are to be, and are being tested.

Without attempting to detail the numerous NLRB decisions testing the legality of union referral procedures and hiring hall practices,[24] the frequency of the occurrence of the question can be demonstrated by a statement contained in a recent Annual Report of the NLRB:

> "As in prior years, a substantial number of the cases against unions arose from complaints alleging con-

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[23] *NLRB v. Penobscot Bay Longshoremen, 310 F. 2d 689 (C.A. 1, 1962); NLRB v. Local 340, Electrical Workers, 301 F. 2d 824 (C.A. 9, 1962); NLRB v. Local 392, Plumbers, 277 F. 2d 56 (C.A. 7, 1960); NLRB v. Local 542, Operating Engineers, 255 F. 2d 703 (C.A. 3, 1958); NLRB v. Local 1423, Carpenters, 238 F. 2d 832 (C.A. 5, 1956); NLRB v. Philadelphia Iron Works, 211 F. 2d 937 (C.A. 3, 1953); cf. NLRB v. Local 419, Painters, 242 F. 2d 477 (C.A. 10, 1957); NLRB v. Local 420, Plumbers, 239 F. 2d 327 (C.A. 3, 1956); NLRB v. Jarka Corp., 198 F. 2d 618 (C.A. 3, 1952).*

[24] For example, the Bureau of National Affairs Labor Reporter Service digests some 100 NLRB decisions from 1948-1960 under the headnote "Hiring Halls; Referral Practices; Preferential Hiring Contracts." Bureau of National Affairs, Inc., *Labor Relations Cumulative Digest and Index 1948-1960*, Vol. II, §59.154.

The reported decisions of the NLRB represent only a small portion of the total cases processed. For example, during fiscal year 1961 of the 2,556 unfair labor practice cases against unions that were closed, 82% were disposed of before issuance of formal complaint. Twenty-Sixth Annual Report of the National Labor Relations Board, p. 226 (Table 7), (1962). The same report reflects that 1958 unfair labor practice charges alleging 8(b)(2) violations by unions were filed during fiscal 1961. *Id.* at 220 (Table 2).

> tractual or informal arrangements under which the participating employer was to give preferential treatment to the union's members, or the union was to have control over such matters as hiring and seniority. The maintenance of agreements which in effect condition employment or employment benefits on union membership and compliance with union rules—other than as permitted by the act's union-security provisions—has consistently been held violative of the nondiscrimination provisions of Section 8(b)(2) and 8(a)(3) in that such arrangements inevitably encourage union membership * * *." *Twenty-Fifth Annual Report of the National Labor Relations Board*—at p. 90 (1961); see also *Twenty-Sixth Annual Report of the National Labor Relations Board* at p. 121 (1962).

This Court's opinion in *Radio Officers Union v. NLRB, 347 U. S. 17 (1954)*, analyzes the purpose of Sec. 8(b)(2) of the federal Act, viz:

> "The policy of the Act is to insulate employees' jobs from their organizational rights. Thus, sections 8(a)(3) and 8(b)(2) were designed to allow employees to freely exercise their right to join unions, be good, bad, or indifferent members, or abstain from joining any union without imperiling their livelihood." *347 U. S. at 40.*

Applying the *Radio Officer's* test to Borden's complaint, it seems evident that his is just that type complaint for which Sec. 8(b)(2) was provided. In fact the state court, in sustaining its common law cause of action, relied upon the same character of evidence that would have been appraised by the NLRB had it been presented *Borden's* case. However, the state court in analyzing 8(b)(2) missed the point, concluding that there was no evidence that the em-

ployer "practiced any discrimination against Borden or treated him anywise different from other employees. He was simply offered a job and requested to obtain a referral from Local Union 100, as were all other employees of Farwell" (R. 351).

On the face of the state court's findings "discrimination" within the meaning of 8(a)(3) was practiced by Farwell Construction, for as the Supreme Court noted in *Radio Officer's, 347 U. S. at 39*, on virtually identical facts:

> "Discrimination is not contested in these cases: involuntary reduction of seniority, *refusal to hire for an available job*, and disparate wage treatment are clearly discriminatory."[25] (Emphasis added.)

This discrimination against Borden resulted from Local 100's refusal to give Borden a referral.[26] For purpose of 8(b)(2) violation the question becomes whether the discrimination was for the purpose prohibited by 8(a)(3): "to encourage or discourage membership in any labor organization."

The Court below in distinguishing Section 8(b)(2) and 8(a)(3) concluded that the proscribed purpose of Section 8(a)(3) was not present:

> "By plain wording of the Act, the discrimination must be limited to purpose of encouragement or discourage-

[25] "Discrimination involves an intent to distinguish in the treatment of employees on the basis of union affiliation or activities, thereby encouraging or discouraging membership in a labor organization * * *."
Botany Worsted Mills, 4 NLRB, 300 (1937).

[26] As noted earlier (Note 13, *supra*) petitioner's third point of error on appeal had been the absence of a causal relation between the denial of referral and inability to obtain the desired employment. This point was overruled by the Court below, stating: "With respect to point three, the referral of plaintiff to the bank site for work at request of Thurman was in accordance with above union custom, refused by Lanham, with resulting injury to plaintiff" (R. 354).

ment of membership in the union and plaintiff was already a member" (R. 351).

Again, the facts of *Radio Officer's* are apposite. Fowler, a member of the union, was removed from a job at union insistence because of his failure to obtain prior union clearance to the job. His punishment was the same as Borden's —no union referrals to Bull Steamship but referrals to other companies. An independent 8(b)(2) ground was the subsequent refusal of the union to honor a company request for Fowler's referral, *347 U. S. at 52*.

The Supreme Court concluded discrimination was present:

> "The circumstances in Radio Officer's and Teamsters are nearly identical. In each case the employer discriminated upon the instigation of the union. The purposes of the union in causing such discrimination clearly were to encourage members to perform obligations or supposed obligations of membership * * *. Both Boston and Fowler were denied jobs by employers solely because of the union's actions. Since encouragement of union membership is obviously a natural and foreseeable consequence of any employer discrimination at the request of a union, these employers must be presumed to have intended such encouragement. It follows that it was imminently reasonable for the Board to infer encouragement of union membership."

The mere fact that Borden was already a union member does not eliminate the purpose proscribed by 8(a)(3). The state court opinion quotes testimony, ample in itself, to sustain an NLRB finding that the discrimination was for the purpose of encouraging union membership, or as the Supreme Court found in *Radio Officer's* "to encourage mem-

bers to perform obligations or supposed obligations of membership." *347 U. S. at 52.*

All we have said above relates to the showing of discrimination *within the federal statute on the basis of the findings set* out in the Texas Court's Opinion. If one looks behind those findings to the record testimony it is even more certain that the federal Act applies.

We have noted earlier (pp. 9-10, *supra*) that though no specific finding as to the reason for the refusal of Borden's referral was made, plaintiffs' own evidence permits of four possible reasons: (1) Borden's violation of a union rule prohibiting solicitation of employment outside the hiring hall; (2) union policy of favoring Dallas residents; (3) the caprice of the business agent; or (4) Borden's failure to comply with lawful hiring hall and referral procedures arranged between employer Farwell and Local 100.

Any one of the first three reasons would have made a violation of 8(b)(2) of the federal Act, while the fourth would have been privileged under NLRB decisions. We turn to a discussion of NLRB application of the federal statute in each of these four situations, viz:

(1) Refusal of referral to enforce an internal union rule violates the federal Act. According to Borden, when he requested referral to the Republic job he was told by the union business agent:

> "You are not going to work down there on the bank job or for Farwell, you have come in here wrong, you have come in here with a job in your pocket" (R. 84, 352).

The meaning is unmistakable: if Borden had "come in" properly (i.e., adhered to his union obligation) he would have received the necessary union referral.[27] Borden was not the only person who received the message, for at a union meeting the membership was advised that Borden "was not referred to the bank site because 'he comes in here wrong'." (R. 219, 353). The only reason given Borden for the refusal to refer was that he had done something "wrong"—even if he had in fact done nothing wrong the effect is the same—in the future Borden would know, if he wanted to work, to stay on the right side of the local union. On this factual analysis it would appear that Borden is a prototype § 8(b)(2) complaint. *Radio Officers Union v. NLRB, 347 U. S. 17 (1954); NLRB v. Philadelphia Iron Works, 211 F. 2d 937 (C.A. 3, 1954).*

(2) Another explanation was given the Farwell foreman when he called the Local requesting Borden's referral. He testified: "I asked Mr. Lanham if he had an H. N. Borden there and he said that he did, and I said, 'Well, if you give him a referral, send him down to this bank * * *.' He [Lanham] said, 'I am not about to send that old [S.O.B.] down there, he shoved his card down our throat and I am not about to send him to the bank'." (R. 145, 353).

This explanation comports with plaintiff's theory of the lawsuit, for plaintiff asserted that the Local had a policy of

[27] Apparently Borden's error was in soliciting and obtaining a job offer from a contractor without prior union clearance. (Borden testimony, R. 79, 80, 84.) Local 100's By-Laws provided "Members shall not solicit work from any contractor or their representative. All employment must be procured through business office of Local Union No. 100 * * *." (Pl. Ex. 6; R. 273, 329.)

refusing referral to out-of-town members who were in the Local by virtue of clearance cards (R. 194-195). Assuming the accuracy of this formulation, it too would constitute an 8(b)(2) violation. *NLRB v. Local 1423, Carpenters, 238 F. 2d 832 (C. A. 5, 1956); NLRB v. Local 340, Electrical Workers, 301 F. 2d 824 (C. A. 9, 1962).*

(3) Should we assume that Lanham's refusal to refer Borden was unrelated to union obligations or membership and was purely the caprice of Lanham, according to a recent NLRB Decision it would nevertheless constitute a violation of §8(b)(1)(A) and (2). In *Miranda Fuel Company, 140 NLRB No. 7 (December 21, 1962)*, the Board held that 8(b)(1)(A) is violated by a union "taking action against any employee upon *considerations*, or classifications which are irrelevant, invidious or unfair." (Emphasis added.) Similarly, the Board there found that 8(b)(2) was violated by a union which "for arbitrary or irrelevant reasons or upon the basis of an unfair classification * * * attempts to cause or does cause an employer to derogate the employment status of an employee."

The Board majority employed a particularly apposite example in its *Miranda* opinion to demonstrate its conception of such a violation; *140 NLRB at* :*

> "* * * Union Business Agent Smith, who operates a union hiring hall under an exclusive hiring hall arrangement, places union member or non-member Jones at the bottom of the referral list and causes his discharge or otherwise refuses to refer Jones, because Jones refuses to court Smith's daughter."

*The official NLRB report is not yet printed. The language appears at page 4 of the mimeographed slip opinion issued by the Board and at *51 LRRM 1586*.

The Board concluded that this would violate §8(b)(1) and (2) of the federal Act.

(4) As might be expected, the state court did not attempt to appraise the facts as they relate to hiring hall practices that are legitimate under Taft-Hartley. It is at least arguable that *if* Borden's error—coming in wrong—related not to an internal union rule but rather to a hiring hall agreement between Farwell and Local 100, the refusal to refer would not have constituted a violation of the Act. *Local 106, United Bro. Carpenters, 132 NLRB 1444 (1961); cf. Teamsters Local 357 v. NLRB, 365 U. S. 667 (1961).* The state court record does not develop the full terms of the hiring hall understanding between Local 100 and Farwell and this remains in the realm of speculation.

We have thus shown that the present record affords ample evidence to warrant finding an 8(b)(2) violation. Conversely, implicit in the record is the possibility that the NLRB, in developing the law of the hiring hall, might have found the conduct of Local 100 permissible under the Act. It is the very inability to be more precise as to the presence of a violation that demonstrates the dangers of state court intrusion.[28]

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[28] A recent law review article by the General Counsel of the NLRB is suggestive of the intricacies of the question. Rothman, *The Development and Current Status of the Law Pertaining to Hiring Hall Arrangements*, 48 Va. L. Rev. 871 (1962). He concludes:

"While the precise limits of the proof necessary to establish violations in exclusive hiring hall situations can be determined only after considerably more decisions have issued implementing the Supreme Court's Local 357 opinion, the following general conclusions may be ventured at this time.

"1. Contracts and hiring arrangements will be found unlawful only if they actually call for a closed shop, or for preferential hir-

(Continued on Page 23)

The state court has assessed and found wanting certain union conduct—conduct being simply the "refusal to refer him [Borden] to a job offered him in the construction of the Republic Bank Building" (R. 348). This self-same union conduct—refusal of referral—has been of pre-eminent concern to the NLRB since 1947.[28] The NLRB through its own procedures, in the exercise of its expertise, has created a formidable body of law governing the operation of union hiring hall and referral procedures. Some of its efforts at regulation of the hiring hall have been ill-fated—e.g., its *Mountain Pacific* formula which was rejected by the Supreme Court in *Teamsters Local 357 v. NLRB*, *365 U. S. 667*. However abortive, this effort to create a comprehensive scheme for regulation of the union hiring hall demonstrates the significance of the hiring hall to the enforcement of Taft-Hartley.

FOOTNOTE 28—(Continued From Page 22)

ing, but not solely on the basis of a lack of safeguards of the *Mountain Pacific* type.

"2. If an employer refuses to employ an applicant or discharges an employee due to his union membership or non-membership or other protected activities, such action is still illegal. Also, a union violates the Act if, on the basis of such reasons, it refuses to refer an applicant under an exclusive hiring hall agreement or causes or attempts to cause an employee's discharge.

"3. The refusal to refer or employ an applicant, or the discharge or attempted discharge of an employee is not unlawful merely because it is due to the enforcement of an exclusive hiring hall arrangement which the applicant or employee has circumvented.

"4. This is true even in situations where an illegal contract exists or where the union maintains discriminatory conditions for registration on its referral list, so long as the refusal to refer or hire or the discharge or attempted discharge is not in itself discriminatory in the sense that the illegality in the contract or the discriminatory refusal to register an applicant is an operative factor of the refusal to refer or employ him or of his discharge or attempted discharge.

"5. However, an employee's non-compliance with legal referral provisions is not a valid union defense to discrimination charges where a union, for discriminatory reasons, deliberately misleads him into believing that he is not eligible for referral and is therefore the cause of his non-compliance with the referral requirement."

[28] *Supra*, p. 15 at note 24.

If Borden was wronged the NLRB could have provided complete vindication.* The NLRB back pay remedy uniformly applied in such cases, would have made him whole and the Board cease and desist order would have prevented further interference with his employment.[30]

The Board, however, does more than assuage private wrongs, for it may in appropriate cases issue broad cease and desist orders directed at a pattern of conduct. In the case at bar there is testimony that not only Farwell hired exclusively through Local 100 referral (R. 142, 143) but that such was the "custom" in the area (R. 214). There was also testimony indicating that only Local 100 members (on clearance card or regular members) were referred by the Local Union (R. 171). Had the NLRB been afforded the opportunity it may have found a pattern affecting the entire industry in the Dallas area. If so, it is not only the

*Borden, ignoring the NLRB, has filed an action in Louisiana against the plumbers local there (R. 119-122).

[30]Ironically, this same Local was the subject of such an order in a quite similar case, in which Breland, a member of Plumbers Local in another city, "was unable to start working because his employment had been conditioned upon his obtaining a work order or clearance from the respondent union and that he had been unable to secure the necessary order." *NLRB v. Local 100, Plumbers, Steamfitters, 291 F. 2d 927 (C.A. 5, 1961)* enforcing 128 NLRB 398 (1960). The Board Order, as enforced by the Circuit Court, required Local 100 to do the following: "Cease and desist from: (a) causing or attempting to cause Claude C. Beard, Sr., and Claude C. Beard, Jr., a partnership doing business as Beard Plumbing Company, its officers, agents, successors, or assigns, to discharge, refuse to hire, or otherwise discriminate against O. W. Breland in violation of Section 8(a)(3) of the Act. (b) in any like or related manner restraining or coercing employees of, or applicants for employment with, Beard Plumbing Company in the exercise of the rights guaranteed in Section 7 of the Act * * * (2) take the following affirmative action, which the Board finds will effectuate the policy of the Act. (a) make whole O. W. Breland for any loss of pay he may have suffered by reason of discrimination against him in the manner and extent set forth in the Section of the Intermediate Report entitled "The Remedy." In addition, the Local was required to post for 60 days notices containing the substance of the foregoing Board Order.

potential conflict that poses dangers, but also the inherent limitations of state courts to enforce the public interest expressed in LMRA. This brings us to a discussion of the law of preemption.

2.

Union conduct regulated by the Federal Labor Statute is not subject to State Jurisdiction.

This case is controlled by the broad formulation of federal pre-emption expressed in *San Diego Bldg. Trades v. Garmon, 356 U. S. 236 (1959)*, and does not fall within the limited exception recognized in *International Association of Machinists v. Gonzales, 356 U. S. 617 (1958)*.

In *Garmon* the Court expressed the test of pre-emption:

> "When an activity is arguably subject to §7 or §8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted. *359 U.S. at 245.*
>
> • • • • •
>
> "Even the States' salutary effort to redress private wrongs or grant compensation for past harm cannot be exerted to regulate activities that are potentially subject to the exclusive federal regulatory scheme." *359 U.S. at 247.*

Specification of the boundaries between state and federal jurisdiction over labor matters has long occupied this Court. The bulk of the litigation has involved questions of

state competence to affect union-employer controveries.[31] Equally important to the "exclusive federal regulatory scheme" is the §7 right[32] of an individual to determine the extent of his participation in concerted activities free from concern for his livelihood. As this Court noted in *Amalgamated Association v. Wisconsin Employment Relations Board, 340 U. S. 383, 390, N. 12 (1951):*

> "Section 7 of the Labor Management Relations Act not only guarantees the right of self-organization and the right to strike, but also guarantees to individual employees the (right to refrain from any or all such activities); at least in the absence of a union shop or similar contractual arrangement applicable to the individual. Since the N.L.R.B. was given jurisdiction to enforce the rights of the employees, it was clear that the Federal Act had occupied this field to the exclusion of state regulation. Plankinton [Plankinton Packing Corp. v. Wisconsin Board, 338 U.S. 953] and O'Brien [Auto Workers v. O'Brien, 339 U.S. 454] both show

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[31] *Laborers, Local 438 v. Curry, ... U. S. , 9 L. Ed. 2d 514; Ex Parte George, U. S. , 9 L. Ed. 2d 133; Marine Engineers Ass'n v. Interlake Steamship Co., U. S. , 8 L. Ed. 2d 418; San Diego Bldg. Trades v. Garmon, 359 U. S. 236; Youngdahl v. Rainfair, 355 U. S. 131; Cavett v. Machinists Lodge 34, 355 U. S. 39; Electrical Workers v. Farnsworth & Chambers Co., 353 U. S. 969; Teamsters Local Union v. Kerrigan Iron Works, 353 U. S. 968; Garmon v. San Diego Bldg. Trades, 353 U. S. 26; Guss v. Utah Labor Relations Board, 353 U. S. 1; Newberry Co. v. Retail Clerks, Local 560, 352 U. S. 987; Elk Construction Co. v. Pocatello Bldg. Trades Council, 352 U. S. 884; Teamsters Local Union 25 v. New York, N.H. & H.R. Co., 350 U. S. 155; Weber v. Anheuser Busch, Inc., 348 U. S. 468; United Construction Workers v. Laburnum Construction Corp., 347 U. S. 656; Kinard Construction Co. v. Building Trades Council, 346 U. S. 933; Garner v. Teamsters, 346 U. S. 485; Amalgamated Ass'n v. Wisconsin Employment Relations Board, 340 U. S. 383; International Union Auto Workers v. O'Brien, 339 U. S. 454; Hill v. Florida, 325 U. S. 538.*

[32] "Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3)." *29 U.S.C. §157.*

that states may not regulate in respect to rights guaranteed by Congress in §7."

Certainly the union conduct for which Borden seeks relief is "arguably subject to §7 or §8 of the Act." *Garmon, 359 U. S. at 245.* Accordingly there is no state court jurisdiction.

This conclusion is fortified by this Court's reaffirmation of *Garmon* in the *Insurance Agents* case, *361 U. S. 477*, where the rationale of federal pre-emption was re-examined and it was noted that pre-emption is not based on the mere fortuity that the state court record may demonstrate a perfected federal violation. Rather, the pre-emption doctrine is applied to avoid the "conflict inherent in overlapping remedies and successive state and federal adjudication of the same conduct."[33]

Specifically, this Court said in *Insurance Agents:*

> "• • • But of special significance is the fact that the approach to pre-emption taken in Briggs-Stratton was that the state courts and this Court on review were required to decide whether the activities were either protected by §7 or prohibited by §8. This approach is 'no longer of general application,' San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 245 N. 4, as this Court has since developed the doctrine in pre-emption cases that questions of interpretation of the National Labor Relations Act are generally committed in the first instance to the Board's administrative processes, San Diego Bldg. Trades Council v. Garmon (U.S.) supra, except in the atypical situation where those processes are not relevant to an answer to the question." *NLRB v. Insurance Agents, 361 U.S. at 493, N. 23 (1960).*

[33] Meltzer, *The Supreme Court, Congress and State Jurisdiction Over Labor Relations, 59 Col. L. Rev. 6 at 15 (1959).*

3.

Gonzales does not permit State Jurisdiction of the case.

The state court reliance upon *IAM v. Gonzales, 356 U. S. 617*, was misplaced. Borden's action falls within the explicit limitation that the majority opinion placed upon the *Gonzales* exception to the general preemption rule.

At the outset *Gonzales* was a suit for restoration of union membership,[34] admittedly a subject matter that LMRA does not treat—the act specifically negates restriction upon union rules with respect to acquisition or retention of membership.[35] Having conceded state court competence to protect Gonzales' rights of membership—the preemption issue was narrowed to whether the state court could complete its remedy by awarding damages to compensate for the pecuniary loss flowing from his ouster from the union.[36]. The Court found the case to be one of only "peripheral concern" to the federal scheme and sustained state court jurisdiction commenting: that

> "The suit did not purport to remedy or regulate union conduct on the ground that it was designed to

[34] We have no question of loss of union membership, for Borden alleged a continuity of union membership. (R. 11.) Moreover, the jury found that Borden was "cleared in" to the Dallas Local. (R. 63.)

[35] Section 8(b)(1)(A) provides: "It shall be an unfair labor practice for a labor organization or its agents—(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: Provided, that this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein * * *." *29 U.S.C. 158(b)(1)(A).*

[36] A recent law review article argues that the sole justification for the *Gonzales* decision is the undesirability of requiring a litigant to seek out two forums in order to obtain complete relief.

"Even the Supreme Court, the conscientious guardian of exclusive NLRB jurisdiction has relented to avoid requiring a party to pursue two wholly separate remedies to vindicate his contract rights. *International Ass'n of Machinists v. Gonzales.*" Sovern, *Section 301 and the Primary Jurisdiction of the NLRB*, 76 Harv. L.R. 529, 555 (1963).

As earlier indicated, complete vindication of Borden's private wrong, if one existed, was available through NLRB procedures.

> bring about employer discrimination against an employee, the evil the Board is concerned to strike at as an unfair labor practice under §8(b)(2). This important distinction between the purposes of federal and state regulation has been aptly described: * * * The state court proceedings deal with arbitrariness vis-a-vis the individual union members and the union; the Board proceedings, looking principally to the nexus between *union action and employer discrimination* * * *" *356 U.S. at 622, 623* (Emphasis added).

This affords no basis for state jurisdiction of Borden's cause of action which complains only of union action (refusal of referral) producing employer discrimination (refusal to hire.)[37]

Can the state courts impose their sanctions upon this "nexus between union action and employer discrimination" by the simple expedient employed by the Texas Courts? i.e., job referral is a right of membership and arbitrary denial of referral gives rise to a common law cause of action. The Texas court assumed the touchstone of Gonzales to be "arbitrary conduct" by a union against a member, regardless of the connection between the union conduct and employment.

If this were the proper reading of *Gonzales*,[38] it is immediately apparent that Fowler, *Radio Officer's v. N.L.R.B.*, *347 U. S. 17*, would have enjoyed concurrent remedy within

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[37]"Borden sought money damages both actual and punitive, for loss of earnings and mental anguish, arising out of allegedly wilful, malicious and discriminatory course of conduct of the two unions; same consisting of the refusal of the unions to treat appellee as any other union member and to refer him to a job offered him in the construction of the Republic National Bank Building." (R. 348.)

[38]It would be equally simple to characterize as arbitrary a refusal to refer because of membership in a sister local, matters clearly regulated by the NLRB. *NLRB v. Local 340, Electrical Workers, 301 F. 2d 824 (C. A. 9, 1962).*

the state courts. The contract between union and employer required the employer to hire only "Radio Officers who are members of the Union in good standing." *347 U. S. at 29.* When Fowler reported for work without union clearance he was immediately suspended from the union, and the employer was notified that Fowler was not in good standing, resulting in Fowler's termination *(347 U. S. at 30).* The N.L.R.B. found that the suspension was "in disregard of Fowler's rights under the union by-laws and constitution" *(347 U. S. 30, N. 25)*, a finding accepted by this Court. Thus, the test employed by the Texas Court (arbitrary denial of rights under Union constitution) inexorably leads to overlapping jurisdiction between state courts and the National Labor Relations Board.

The rationale of *Gonzales* is not to be found in looking simply to the question of "arbitrary conduct" by a union directed against a member, nor even to the existence of a violation of the member's rights under the union constitution—the tests articulated by the Texas Courts. The proper test is that expressed in *Gonzales* to be "the nexus between union action and employer discrimination."

4.

Gonzales requires re-examination.

We have demonstrated that both majority and minority in *Gonzales* require rejection of state court power to determine Borden's suit. We now turn to an examination of the validity of *Gonzales* in the light of the later *Garmon* opinion and the applications which the state courts have made of *Gonzales* in the last five years.

The core of the pre-emption idea, resting squarely on the supremacy clause, is that the states cannot set aside Congressional enactments. *Gonzales* was decided when a majority of this court was assuming that the application of federal pre-emption depended primarily on possible conflict of remedies, *United Construction Workers v. Laburnum, 347 U. S. 656 (1954); International Union, U. A. W. v. Russell, 356 U. S. 634 (1958).* But *Garmon* examined and rejected this assumption, and properly based preemption, not on the narrow grounds of possible conflict of remedy, but on the conduct under examination, i.e. "the nature of the activities which the States have sought to regulate, rather than on the method of regulation adopted" *356 U. S. at 243.*[10]

Thus *Gonzales* is consistent with the skein of preemption decisions only on the narrow ground of involvement with matters of "merely peripheral concern," not basically interwoven with the activities which the federal scheme seeks to regulate. So limited, *Gonzales* is consistent with the other opinions of this court, and makes sense. Except that it per-

[10] The Court thus in *Garmon* returned to the rationale explicated in *Garner v. Teamsters, 346 U. S. 485, 489-491:*

> "The question then is whether the state, through its courts, may adjudge the same controversy and extend its own form of relief.
>
> "Congress did not merely lay down a substantive rule of law to be enforced by any tribunal competent to apply law generally to the parties. It went on to confide primary interpretation and application of its rules to a specific and specially constituted tribunal and prescribed a particular procedure for investigation, complaint and notice, and hearing and decision, including judicial relief pending a final administrative order. Congress evidently considered that centralized administration of specially designed procedures was necessary to obtain uniform application of its substantive rules and to avoid these diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies • • • A multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law." *Garner v. Teamsters, 346 U. S. 485, 489-491.*

See also, *NLRB v. Insurance Agents, 361 U. S. 477 at 493, note 23;* see p. 27, *supra.*

mits the States, rather than the NLRB, in the first instance to determine the scope of the federal Act.

What *Gonzales* does not envisage, and what the last five years have shown, is the disparate determinations as to what is "central" and what is "peripheral" which come when fifty separate states, with their varying policy notions make the decisions. In other words, *Gonzales* makes sense only if the determination as to the scope of the federal Act is made by the *federal* rather than the *state* forum.

The problem persists in the state courts' subsequent application of the *Gonzales* rule. For a southern state's notion of what is "central" to the federal scheme, and what is on the "fringe" is necessarily based on the state courts policy ideas of the purpose, interpretation and effect of the federal statute.[40] And to permit the state court to make this determination of questions of a 'Delphic nature"* has not resulted in either consistency or implementation of the federal regulatory scheme.

To the contrary, the process of "litigating elucidation", *356 U. S. at 619*, by which the majority in *Gonzales* wished to mark the boundaries between what is central—and federal, as distinguished from that which is peripheral—and state, has actually served to obscure the boundaries, and as in the case at bar, to permit state determination of issues basic to the administration of the federal Act.

A number of state courts, such as Texas, have assumed that *Gonzales* permits application of state common law to

[40]Except in the limited area of §14(b) of the federal Act, p. 38 n. 45, *infra*, Congress has provided that such determination be made by utilizing the expertise of NLRB.

Int'l Ass'n of Machinists v. Gonzales, 356 U. S. at 619.

any suit by individuals against labor unions. Thus, in *Gossett v. Local 185,* S. W. 2d , 51 L.R.R.M. 2664 (Tex. Civ. App. 1962) another Texas Court of Appeals "assumed, without deciding," that it would have jurisdiction over a suit by a member against his union grounded on "alleged acts of discrimination which prevents plaintiff from pursuing his trade as a member of Local Union No. 185." These courts justify jurisdiction on the enforcement of state policy, without regard to the federal scheme governing such conduct. The result is federal rights are vouchsafed or denied, depending on the policy notions of the particular state tribunal, viz:

Idaho: Following an alleged improper suspension from union membership which resulted in his loss of employment, Lockridge sued the union for compensatory and punitive damage caused by the suspension (he did not seek reinstatement). The Idaho Supreme Court, in reversing the trial court's dismissal on the ground of federal pre-emption, stated:

> "We must assert jurisdiction in every doubtful case, to the end that our citizens be not denied relief for wrongs 'neither protected nor prohibited' nor 'pre-empted' by federal law, or more appropriately, by the National Labor Relations Board." *Lockridge v. Motor Coach Employers, 369 P. 2d 1006 (1962).*

Kansas: The Supreme Court of Kansas recently affirmed state court jurisdiction over an action brought by an individual alleging that the defendant union "caused plaintiff to be discharged from his said employment because plaintiff was not a member of said union." The Court stated:

> "In the case at bar there can be no question that the action is maintained under the common law of Kansas

> as aided and fortified by the recent 'right to work' constitutional amendment. Actually there is little that the National Labor Board could give to this plaintiff. The job was one of temporary character and has long since been completed; the Board could hardly restore plaintiff to his job. It might restore certain wages, but that is only a small part of plaintiff's damages alleged in the petition *supra*. He is entitled under state law to attempt to prove these damages." *Taylor v. Hoisting Engineers, Local 101, 189 Kan. 137, 368 P. 2d 8 (1962).*

Ohio: In the state courts of Ohio Perko sued his union alleging that that union and its officers had conspired to deprive plaintiff of his opportunity at work and had coerced, by threat of strike, one employer to discharge plaintiff. The Ohio Supreme Court, in sustaining jurisdiction, commented:

> "The National Labor Relations Act does not give the National Labor Relations Board such exclusive jurisdiction over the subject matter of an action to recover damages for a common law tort, which is also an unfair labor practice proscribed by the Act, as to preclude an appropriate state court from exercising jurisdiction." *Perko v. Local 207, Ironworkers, 168 Ohio St. 161, 151 N.E. 2d 742 (1958).*[41]

Arizona, North Carolina, California and *Tennessee* have been equally willing to accept jurisdiction over similar controversies, apply their own common law, and adjudicate the rights and duties of the parties.[42]

[41] Certiorari has been granted in the *Perko* case, and it will be argued at the same time as the case at bar.

[42] *Sheet Metal Workers v. Nichols, 89 Ariz. 187, 360 P. 2d 204 (1961),* suit alleging oral conspiracy to deprive plaintiff of employment in violation of state right to work law; *Willard v. Huffman, 250 N. C. 396, 109 S. E. 2d 233 (1959), cert. denied, 361 U. S. 893; Pierce v. Otis Elevator, 331 P. 2d 481 (1958); Dick v. Large, 51 L.R.R.M. 2672 (Tenn. Ct. of App. 1962).*

Other state courts have not been so receptive to such litigation.

Pennsylvania: Wax sued his union alleging improper expulsion from the union, and as a consequence of the expulsion an inability to obtain employment. He sought reinstatement and damages. The Pennsylvania Supreme Court held the action pre-empted to the exclusive jurisdiction of the NLRB, concluding that the activity was 'arguably subject to a §8 proceeding" relying upon *San Diego Bldg. Trades v. Garmon, 359 U. S. 326; Wax v. Int'l Mailers Union, 400 Pa. 173, 161 A. 2d 603 (1960).*

New York: A New York appellate court declined jurisdiction over a suit that sought damages, "for the alleged wrongful termination of the plaintiff's employment * * * stemming from the allegedly invalid expulsion of plaintiff from membership in defendant union." The plaintiff sought only damages and not reinstatement, the Court, finding no jurisdiction, remanded to permit plaintiff to alter his cause of action to seek reinstatement. *Green v. Folks, 13 App. Div. 2d 744, 215 N. Y. S. 2d 116 (1961).*[43] On remand, plaintiff dropped employer as a defendant and recast his pleadings, tracking *Gonzales*. The Appellate Division, believing that it was required by *Gonzales*, then accepted jurisdiction of the very controversy which had earlier been refused. *223 N. Y. S. 2d 80.* If *Gonzales* permits this, federal jurisdiction as to matters at the heart of the federal statute may be defeated.

[43] See also *Fullerton v. International Sound Technicians, 194 Cal. App. 2d 805 (1961)*; cf. *Hod Carriers Local 502 v. Park Arlington Corp., 73 N.J.S. 433, 180 A. 2d 181 (1962).*

merely by the turn of emphasis in a pleading. Such a rule will devastate the federal policy.

If state courts are permitted to apply their own common law concepts to these rather intricate union-employer-member relationships, the rights of the member-employee are governed only by the accident of residence. The effect of state court involvement is apparent, and even the states "salutary efforts to redress private wrongs" cannot justify their disruptive effect.

Moreover, if state courts remain empowered to determine their own jurisdiction based on their own notions of the policy and scope of the federal statute there will be further disruption of the federal scheme. The proper rule would commit these controversies in the first instance, to the NLRB procedures. Cf. *NLRB v. Insurance Agents, 361 U. S. 477, 493 (1960).*

5.

There is no compelling State interest to justify an exception to preemption.

This Court has recognized state jurisdiction in controversies attended by violence "because the compelling state interest in the scheme of our federalism, in the maintenance of domestic peace is not overridden in the absence of clearly expressed congressional direction." *San Diego Bldg. Trades v. Garmon, 359 U. S. at 247.* The opinions of the Texas courts do not suggest the existence of "compelling state interest." The Texas Supreme Court simply articulated a com-

mon law cause of action: willful denial of a "job opportunity to which Lanham knew he [Borden] was entitled under the rules and procedures established by petitioners for allocating work among their members * * *" (R. 34).

Texas' mere expression of interest in regulating a type of conduct that has already become the subject of federal regulation in Taft-Hartley does not justify acquisition of jurisdiction, for

> "Controlling and therefore superseding Federal power cannot be curtailed by the state even though the ground of intervention be different than that on which federal supremacy has been exercised." *Weber v. Anheuser Busch, 348 U.S. 468, 479 (1955).*

Nor does the fact that Borden's complaint alleged unspecified rights under Article 5207A of the Texas statutes,* vest

*This Texas statute provides:

"Section 1. The inherent right of a person to work and bargain freely with his employer, individually or collectively, for terms and conditions of his employment shall not be denied or infringed by law, or by any organization of whatever nature.

"Section 2. No person shall be denied employment on account of membership or nonmembership in a labor union.

"Sec. 3. Any contract which requires or prescribes that employes or applicants for employment in order to work for an employer shall or shall not be or remain members of a labor union, shall be null and void and against public policy. The provisions of this Section shall not apply to any contract or contracts heretofore executed but shall apply to any renewal or extension of any existing contract and to any new agreement or contract executed after the effective date of this Act.

"Sec. 4. Definitions. By the term 'labor union' as used in this Act shall mean every association, group, union, lodge, local, branch or subordinate organization of any union of working men, incorporated or unincorporated, organized and existing for the purpose of protecting themselves and improving their working conditions, wages, or employment relationships in any manner, but shall not include associations or organizations not commonly regarded as labor unions.

"Sec. 5. If any clause, sentence, paragraph or part of this Act or the application thereof to any person or circumstances, shall for any reason be adjudged to be invalid, such judgment shall not affect, impair, or invalidate the remainder of this Act and the application thereof, but shall be confined in its operation to the portion of the Act directly involved in the controversy in which judgment shall have been rendered and to the person or circumstances involved." *Article 5207 a, Rev. Civ. Stat. of Texas.*

jurisdiction in the state courts.[45] Neither the Texas Court of Civil Appeals nor the Supreme Court of Texas deemed that they were enforcing any rights under this statute. The Texas opinions make clear that Texas courts are implementing only "rights of membership" and protecting against "arbitrary" action.

Moreover, as we have demonstrated, Congress has made clear that in labor relations matters within the federal statute, such state policy must give way to the effectuation of the uniform national labor policy. Only in the limited circumstance narrowly defined in Section 14(b) of the federal Act may the states act. While Congress has there left to the states the prohibition of the execution or application "of agreements requiring membership in labor organization as a condition of employment,"[46] this record shows no such agreement. Additionally, this court's reversal of the Georgia Supreme Court in *Laborers Local 438 v. Curry*, U. S. , *9 L. Ed. 2d 514, 518 (1963)*, makes clear that the state "right-to-work" law has no valid application to the activities disclosed by this record.[47]

This Court's recent recognition of State Court competence to enforce collective bargaining contract rights at the behest of members beneficiary of such contracts, is only an affirm-

[45] Plaintiff for the first time alluded to Art. 5154 of the Texas Statutes (Reprinted Appendix p. 56, *infra*) in its Brief in Opposition to Petition for Certiorari. (p. 2.) On its face this statute has no application, nor is it referred to by any of the Texas courts in their various opinions. Apparently the reference should have been to 5154g (reprinted Appendix p. 57). It too has not been referred to in the past by plaintiffs or the state courts.

[46] Section 14(b) of the federal Act provides, *29 U.S.C. 164(b)*:

"(b) Nothing in this Act shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law."

[47] See also, *Electrical Workers v. Farnsworth & Chambers, 353 U. S. 969.*

ance of the concurrent jurisdiction of state courts in the narrow area of enforcement of collective bargaining contract rights. *Smith v. Evening News, 371 U. S. 195 (1962)*. But the case can give no comfort to Borden. For it permits state action pursuant to Section 301 of the Federal Act, *29 U. S. C. 185(a)*, in the limited area of collective bargaining contract enforcement. Borden admits in his response to the petition for certiorari herein: "Only a brief glance at the facts of the case will show that there was no collective bargaining agreement involved * * *." *(Opposition to certiorari, p. 8)* Thus, since this suit is not grounded on any collective bargaining agreement, the *Evening News* case is not apposite.

Finally, any thought that Congress intended to leave unfettered the effectuation of state policy in this realm is negatived by Congressional enactment of the Landrum-Griffin amendments. *73 Stat. 519, 29 U. S. C. 153, et seq.*

If Congress had been so inclined, the passage of the Labor Management Reporting and Disclosure Act of 1959, afforded an ideal opportunity to provide a state and federal court remedy for claims such as Borden's. It chose just the contrary. In *Title I 73 Stat. 522; 29 U. S. C. 411*, Congress expressed its view of the internal rights of members within labor organizations: to vote, to participate fully in union decisions, to be free from improper union discipline. In these areas Congress created a federal remedy and preserved existing state court remedies.

Conversely, it chose to amend §8 of L.M.R.A. to provide more explicit guidelines for NLRB regulation of union hir-

ing halls in the construction industry, *73 Stat. 545, 29 U.S.C. 158(f).*"

CONCLUSION

To require state tribunals to keep hands off controversies with respect to the establishment and operation of hiring halls and referral procedures makes sense in the effectuation of a uniform national policy. Moreover, it makes sense to rely on the expertise of a specialized tribunal to apply its knowledge of labor economics to the preservation of traditional institutions by which labor and management prosper in providing the requisite labor skills at the appropriate time to keep the economy moving. Congress has indicated, and experience has confirmed, that abuses arising in the operation of such institutions can be fairly curbed, and both public and private interests vindicated by the federal tribunals under the federal Act.

State courts centering on vindication of private rights, while ignoring the social utility of the institutions which are rendered inoperable by such single-minded attention to the interest of the individual, can only serve to upset the federal regulatory scheme.

"Section 8(f) of the Act as amended now provides: "It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members * * * because * * * (3) such agreement requires the employer to notify such labor organization of opportunities for employment with such employer, or give such labor organization an opportunity to refer qualified applicants for such employment, or (4) such agreement specifies the minimum training or experience qualifications for employment or provides for priority in opportunities for employment based upon length of service with such employer, in the industry or in the particular geographical area * * *."

The denial of state jurisdiction does not leave the individual without remedy. The federal scheme assures the individual protection both in the requirement that the wrongdoer "cease and desist" from the unfair labor practice, and in the award of reinstatement with back pay.

For the reasons stated it is respectfully submitted that the judgment of the court below should be reversed.

Respectfully,

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March 3, 1963.

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APPENDIX

The relevant portions of the Labor Management Relations Act, of 1947 (61 Stat. 136, 29 U.S.C. 141 et seq.), are as follows:

Section 1:

* * * * *

(b)

* * * * *

It is the purpose and policy of this Act, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the right of individual employees in their relations with labor organizations whose activities affect commerce, to define and proscribe practices on the part of labor and mangement which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce.

Section 2. Definitions.

* * * * *

(2) The term "employer" includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any corporation or associa-

tion operating a hospital, if no part of the net earnings inures to the benefit of any private shareholder or individual, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

* * * * *

(6) The term "commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between and foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but

through any other State or any Territory or the District of Columbia or any foreign country.

(7) The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

(8) The term "unfair labor practice" means any unfair labor practice listed in section 8.

* * * * *

RIGHTS OF EMPLOYEES

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

UNFAIR LABOR PRACTICES

Sec. 8. (a) It shall be an unfair labor practice for an employer—

* * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encour-

age or discourage membership in any labor organization: Provided, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8 (a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representatives of the employees as provided in section 9 (a), in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 9 (e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: Provided further, That no employer shall justify any discrimination against an employee for non-membership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * * * *

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: Provided, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * * * * *

(f) It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by an action defined in section 8 (a) of this Act as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 9 of this Act prior to the making of such agreement, or (2) such agree-

ment requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later, or (3) such agreement requires the employer to notify such labor organization of opportunities for employment with such employer, or gives such labor organization an opportunity to refer qualified applicants for such employment, or (4) such agreement specifies minimum training or experience qualifications for employment or provides for priority in opportunities for employment based upon length of service with such employer, in the industry or in the particular geographical area: Provided, That nothing in this subsection shall set aside the final proviso to section 8 (a) (3) of this Act: Provided further, That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 9 (c) or 9 (e).

* * * * *

PREVENTION OF UNFAIR LABOR PRACTICES

Sec. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: Provided, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly

local in character, even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith.

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: Provided, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion

of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to the Act of June 19, 1934 (U. S. C., title 28, secs. 723-B, 723-C).

(c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: Provided, That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization as the case may be, responsible for the discrimination suffered by him: And provided further, That in determining whether a complaint shall issue alleging a violation of section 8 (a) (1) or section 8 (a) (2), and in deciding such cases, the same regulations and rules of decision shall apply irrespective of whether or

not the labor organization affected is affiliated with a labor organization national or international in scope. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. In case the evidence is presented before a member of the Board, or before an examiner or examiners thereof, such member, or such examiner or examiners, as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed.

(d) Until the record in a case shall have been filed in a court, as hereinafter provided, the Board may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it.

(e) The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order

such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified

by the Board, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

(g) The commencement of proceedings under subsection (e) or (f) of this section shall not, unless specifically ordered by the court, operate as a stay of the Board's order.

(h) When granting appropriate temporary relief or a restraining order, or making and entering a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part an order of the Board, as provided in this section, the jurisdiction of courts sitting in equity shall not be limited by the Act entitled "An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes," approved March 23, 1932 (U. S. C., Supp. VII, title 29, secs. 101-115).

(i) Petitions filed under this Act shall be heard expeditiously, and if possible within ten days after they have been docketed.

The Relevant Texas Statutes are:

"Art. 5207a. Right to bargain freely not to be denied; membership in labor union:

"Section 1. The inherent right of a person to work and bargain freely with his employer, individually or collectively for terms and conditions of his employment shall not be denied or infringed by law, or by any organization of whatever nature.

"Sec. 2. No person shall be denied employment on account of membership or nonmembership in a labor union.

"Sec. 3. Any contract which requires or prescribes that employees or applicants for employment in order to work for an employer shall or shall not be or remain members of a labor union, shall be null and void and against public policy. The provisions of this Section shall not apply to any contract or contracts heretofore executed but shall apply to any renewal or extension of any existing contract and to any new agreement or contract executed after the effective date of this Act.

"Sec. 4. Definitions. By the term 'labor union' as used in this Act shall mean every association, group, union, lodge, local, branch or subordinate organization of any union or working men, incorporated or unincorporated, organized and existing for the purpose of protecting themselves and improving their working conditions, wages, or employment relationships in any manner, but shall not include associations or organizations not commonly regarded as labor unions.

"Sec. 5. If any clause, sentence, paragraph or part of this Act, or the application thereof to any person or circumstances, shall for any reason be adjudged to be invalid, such judgment shall not affect, impair, or invalidate the remainder of this Act and the application thereof, but shall be confined in its operation to the portion of the Act directly involved in the controversy in which judgment shall have been rendered and to the person or circumstances involved. Acts 1947, 50th Leg., p. 107, ch. 74."

"Art. 5154. [5246] Organizations excepted

"The preceding Article shall not be held to apply to any combination or combinations, or to any act by any member of such trades union or other organization or association, or any other person, or to an agreement between two or more persons, formed or taken for the purpose of limiting the production, transportation, use or consumption of labor's products, or which creates a 'Trust' or 'Conspiracy in Restraint of Trade', as defined by the laws of this state. Nothing herein contained shall be held to interfere with the terms and conditions of private contract with regard to the time of service or other stipulations between employers and employees. Nothing herein shall be construed to repeal, affect or diminish the force and effect of any statute now existing on the subject of trusts, conspiracies against trade, pools and monopolies. Acts 1899, p. 262; Acts 1947, 50th Leg., p. 530, ch. 310, § 2."

Art. 5154g, R.C.S.

Section 1. It is hereby declared to be the public policy of the State of Texas that the right of persons to work shall not

be denied or abridged on account of membership or non-membership in any labor union or labor organization and that in the exercise of such rights all persons shall be free from threats, force, intimidation or coercion.

Sec. 2. It shall be a violation of the rights set forth in Section 1 for any person or persons, or associations of persons, or any labor union or labor organization, or the members or agents thereof, acting singly or in concert with others, to establish, call, maintain, participate in, aid or abet any strike or picketing, an object of which is to urge, compel, force or coerce any employer to recognize or bargain with, or any employee to recognize or bargain with, or any employee or group of employees to join or select as their representative, any labor union or labor organization which is not in fact the representative of a majority of the employees of an employer or, if the employer operates two or more separate and distinct places of business, is not in fact the representative of a majority of such employees at the place or places of business subjected to such strike or picketing.

Sec. 3. In any proceeding or suit that may be instituted under the provisions of Section 2 hereof, the trial judge, prior to final hearing thereon, is hereby authorized to order an election, by the employees of the employer subjected to strike or picketing, for the purpose of determining whether a labor union or labor organization is in fact the representative of a majority of the employees of said employer, and any such election shall be held, within twenty (20) days after the institution of such proceeding or suit, by a disinterested master appointed by the trial judge, under rules of pro-

cedure prescribed by the trial judge, which shall provide that the employer and the said labor union or labor organization may each have one representative present at the voting place or places as an observer, such representatives to be approved by the trial judge, and the voting of such election shall be by secret ballot. The ballots used in all elections under this Act shall be on plain white paper through which printing or writing cannot be read, shall be uniform in size, and shall not be numbered nor have attached in any manner any form of stub nor shall the person using said ballot be required to sign the same. Employment lists will be checked and no employees shall be allowed to vote more than once. Each ballot shall be initialed by the judge before being presented to the voter. All employees of the employer at the time of the commencement of the strike or picketing complained of shall be eligible to vote in any such election except employees who have since quit or been discharged for cause, which shall not include the participation in the strike or picketing complained of, and have not been rehired or reinstated prior to the date of the election; provided, however, that permanent replacements of employees on strike shall be eligible to vote in any such election.

Sec. 4. Any person, organization or association who violates any of the provisions of this Act shall be liable to the person suffering therefrom for all resulting damages, and the person subjected to strike or picketing in violation of this Act is given right of action to redress such wrong or damage, including injunctive relief, and the District Courts of this

State shall grant injunctive relief when a violation of this Act is made to appear.

Sec. 5. The State of Texas, through its Attorney General or any District or County Attorney, may institute suit in the District Court to enjoin any person or persons, association of persons, labor union or labor organization from violating any provision of this Act.

Sec. 6. Any party to any suit or cause of action arising under this Act may make, within two (2) days after notice of the institution of said cause, application to the Presiding Judge of the Administrative Judicial District within which the suit is filed who shall immediately assign a District Judge from within said Administrative Judicial District who shall then hear all proceedings in the cause.

Sec. 7. If any word, clause, sentence, paragraph or part of this Act, or the application thereof to any person or circumstance, shall for any reason be held invalid, such invalidity shall not affect the remaining portions of this Act, it being the intent of the Legislature to pass the valid parts of this Act even though some one or more words, clauses, sentences or paragraphs shall be held invalid. (S. B. 45, Acts 1955, 54th Leg., Ch. 387, p. 1029.)